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No. 00-

IN THE

Supreme Court of the United States

BRIAN WILLIS,

Petitioner,

v.

SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency, and LIN BUSHORE, individually and in her official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the governmental employer, by intimidation or coercion, conditions an employee's terms and conditions of employment upon the employee's speech or potential speech, is the First Amendment Free Speech protection triggered regardless of whether the employee actually spoke?

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Petitioner, Brian Willis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit

OPINIONS BELOW

The unreported opinion of the United States District Court is reproduced in the Appendix filed herewith ("App.") at B. The unreported opinions of the Eleventh Circuit Court of Appeals are reproduced at A and C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISIONS CITED

42 U.S.C. § 1983

First Amendment of the United States Constitution

STATEMENT OF THE CASE

Brian Willis was employed by Respondent, the School Board of St. Lucie County ("School Board"), during the 1996-1997 academic year as an Agribusiness and Natural Resources Instructor. Willis taught at Fort Pierce Westwood High School in Fort Pierce, Florida within the St. Lucie County School District. Respondent Linn Bushore was the principal of Westwood High School at all times during Willis' employment.

Bushore hired Willis in July 1996 to serve as a Teacher at Westwood High School. His position was subject to annual reappointment. During Willis' employment at Westwood High School, a co-worker by the name of Lee Baron was the subject of an internal investigation by school officials. Mr. Baron was another Agriculture Teacher, and Willis shared a classroom with him and they worked together on the farm on a daily basis.

In or about March 1997, Bushore approached Willis and told him that Baron was placed on administrative leave and that Willis should not ask any questions. She told him that he should testify against Baron in an investigation because it would be in his best interests to do so. She told him that if Mr. Baron were gone, Willis would be the Head of the Agriculture Department. She told Willis that she wanted him to testify that he saw Baron chew tobacco, that he fondled a student, that he did not supervise students, that he was not supervising students at the farm, and that he let students smoke and chew tobacco at the farm. Willis refused to testify. When asked at his deposition why he did not testify, Willis said "because I wouldn't lie".

Bushore, in her deposition, testified that "after Mr. Baron was reassigned, there was an initial fact-finding investigation that takes a look at what the complaint is and individuals within his class that may have had similar concerns. It was also reported to outside investigators". The outside investigator was the law firm of Respondents' counsel. Bushore testified that some teachers were asked to provide statements under oath to the law firm conducting the investigation for the School Board. Willis testified that Bushore requested him to testify in the Baron investigation. The testimony Willis was asked to provide was understandably to be made under oath as part of this investigation.

Approximately a month later, Bushore again approached Willis about testifying against Baron. Willis told her that he could not do it. "She said if 'I didn't, she said, you know, Brian, you don't have tenure and if you don't testify against Mr. Baron, I can't see renewing your contract.' "

By letter dated May 1, 1997, Ms. Bushore advised Mr. Willis that she was not recommending him for a contract for the 1997-1998 school year.

Willis was teacher of the month at Westwood High School for the months of December, January and February during the 1996-1997 school year, and he received a very favorable performance review by Mr. Jones, the Assistant Principal, on March 19, 1997.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to decide an important federal question that is being interpreted by the federal circuit courts of appeals and that question is whether silence can still be protected speech in public employment. Ever since *Pickering v. Board of Education*, 391 U.S. 563 (1968), courts have used the following formula to determine whether a public employee has engaged in protected speech: (1) the expression must address a matter of public concern; (2) the employee's interest in free speech must outweigh the governmental employer's interest in preserving the efficiency of government services; (3) the employee's speech was a substantial motivating factor in dismissing the employee from employment; and (4) the public employer must be able to prove by a preponderance of the evidence that it would have disciplined or terminated the employee even without the protected speech. In *Connick v. Myers*, 461 U.S. 138,

147 (1983), the Court held that the employee expression must relate to a matter of political, social or other concern to the community in order to be protected speech and whether the speech addresses a matter of public concern must be determined by the content, form and context of the speech.

Since *Connick*, federal circuit courts of appeals have so much focused on the speech being uttered in order to determine whether it relates to a matter of public concern, that they have overlooked the issue that the very act of silence is itself protected and that the real issue turns on the conduct of the government in creating an intimidating and coercive environment where the truth is subverted. Courts, in an effort to apply the Connick/ Pickering formula, have taken a strained approach to the facts of a public employment case in order to squeeze those facts into a rigid mathematical formula. By utilizing this approach, courts have overlooked the very principle underlying the purpose the First Amendment was meant to serve, and in the process, courts have permitted governmental coercion and intimidation to escape constitutional scrutiny. *See, e.g.*, *Buazard v. Meredith*, 172 F.3d 546, 549 (8th Cir. 1999) (holding that if public employer ordered the employee to lie and then demoted him for refusing, an injustice was done, but it was not one actionable under 42 U.S.C. § 1983 on a free-speech theory); *Wasson v. Sonoma County Junior College*, 203 F.3d 659 (9th Cir. 1999) (holding that there can be no First Amendment cause of action where there was no speech by the plaintiff); *Fogarty v. Boles*, 121 F.3d 886, 890-91 (3rd Cir. 1997) (holding that a free speech claim depends on speech); *Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990) (no free speech right when no speech occurred); *Jones v. Collins*, 132 F.3d 1048 (5th Cir. 1998) (retaliation in the absence of any actual expression by Jones that is subject to First Amendment protection, did not constitute a constitutional violation).

The Eleventh Circuit Court of Appeals, which is the circuit to which Petitioner Willis directs this petition for writ of certiorari, has recognized that silence can be protected speech, *see Sykes v. McDowell*, 786 F.2d 1098, 1104 (11th Cir. 1986) ([a] public employee who positively asserts the right not to speak to support his employer is within the protection of the First Amendment); *Nicholson v. Gant*, 816 F.2d 591, 599 (11th Cir. 1987) (followed *Sykes*), but in those cases, it required the refusal to speak to relate to some political issue such as the political campaign in *Sykes* and the political rally in *Nicholson*. The Eleventh Circuit, like the circuits in the above-cited cases, is not stopping to consider whether the very act of coercion by the government is proper. In such cases, where the government coerces or threatens an employee to speak or not speak or retaliates against an employee for its belief that the employee has engaged in certain speech, the burden should be placed on the employer to justify whether the coercion or the prohibition made is even proper in the first place. The Eleventh Circuit in our case affirmed the district court's opinion that Willis' silence was not protected. By affirming the district court, the Eleventh Circuit is requiring some type of verbal utterance to be made by the public employee in a certain kind of proceeding in order to trigger the First Amendment, thereby contributing to the withering of First Amendment rights.

The common theme of the above-cited cases is the underlying coercion and intimidation that is perpetuated by their holdings. In *Connick*, this Court held that "the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people". *Id.* at 145. This "interchange" has been fettered by allowing public employers to create

intimidating and coercive environments where the truth can be undermined. An actual interchange need not take place in order to trigger the First Amendment, what triggers the first amendment is the very climate where the governmental employer prevents that potential interchange from even taking place, and in that climate, the truth is subverted.

I.

WHERE THE GOVERNMENTAL EMPLOYER, BY INTIMIDATION OR COERCION, CONDITIONS AN EMPLOYEE'S TERMS AND CONDITIONS OF EMPLOYMENT UPON THE EMPLOYEE'S SPEECH OR POTENTIAL SPEECH, THE FIRST AMENDMENT FREE SPEECH PROTECTION IS TRIGGERED REGARDLESS OF WHETHER THE EMPLOYEE ACTUALLY SPOKE

The Eleventh Circuit's adoption of the district court's opinion in this case severely undermines the import that truth plays in public employment. The district court held that "if, as Mr. Willis contends, his superior ordered him to lie, and retaliated against him for refusing to do so, an injustice was done. But it is not one actionable under 42 U.S.C. § 1983 on a free speech theory". The court, in reaching this conclusion, followed the holding in *Buazard v. Meridith*, 172 F.3d 546, 549 (8th Cir. 1999).

In *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999), the Chief of Police, Meridith, instructed a public employee, police officer Buazard, to file a report concerning an incident wherein a police officer conspired with two prisoners to induce another police officer to mace a third prisoner. Both officers were fired. Buazard expressed his disagreement with

the way in which the chief of police handled the matter, and later attended a luncheon with the chief of police and the mayor wherein the mayor stated that the city could not afford a wrongful termination suit by the fired officers. After this luncheon, Chief of Police Meredith told Buazard that some of the statements in his report were incorrect and that he needed to change them. Buazard refused to change his report because doing so would cause him to file a false report. Buazard was later demoted. The Eight Circuit Court of Appeals found that Buazard could not state a First Amendment claim and held that "If, as plaintiff contends, his superior ordered him to lie and then demoted him for refusing, an injustice has been done. But it is not one actionable under 42 U.S.C. § 1983 on a free-speech theory". *Buazard* at 549.

In *Buazard* the Court did not focus on the very act of Buazard's refusal to speak and the implications surrounding that refusal, but instead, in order to determine whether the speech was protected, mechanically went to the next prong of the *Pickering* formula to determine whether the speech was of a purely internal nature. The very fact that Buazard was requested to change his statement, regardless of the context in which that statement was going to be used, is of first amendment concern, since Buazard was demoted, by his governmental employer, for refusing to lie. A dissenting opinion was filed in *Buazard*.

Here, the undisputed facts revealed requests for testimony in exchange for job security and a promotion to the position of Head of the Agriculture Department. Willis refused to testify. When asked at his deposition why he refused to testify, Willis replied "because I wouldn't lie".

In *Wasson v. Sonoma County Junior College*, 203 F.3d 659 (9th Cir. 1999), a case cited by Respondents to the Eleventh Circuit in this case and a case which also has been filed with this Court on petition for a writ of certiorari, the Ninth Circuit held that the public employer could not be liable under the First Amendment because there was no speech. In that case, the Ninth Circuit Court of Appeals, like the Eleventh Circuit Court of Appeals in our case, permitted governmental intimidation to go unpunished. In *Wasson*, the plaintiff-employee Wasson was accused of authoring anonymous letters throughout the college that accused the district president of misconduct. Wasson denied authoring those writings but her employer nonetheless concluded that she was responsible and disciplined her. The Court held that because Wasson denied writing the letters, no speech was implicated. A dissenting opinion expressing the serious policy concerns and chilling effect of the majority holding, was filed.

In *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) this Court held that the First Amendment protects both the right to speak freely and the right to refrain from speaking at all. In that case, the plaintiff refused to display a portion of his license plate which contained the state's motto "live free or die". This Court cited to this Court's earlier holding in *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind". The individual freedom of mind of such import to this Court is what was stifled by the Eleventh Circuit's affirming of the district court's opinion in this case.

It has become apparent that what the holding of *Connick* did was undermine the impact of the principles underlying the *Wooley* decision. Federal circuit courts have become so preoccupied with applying a mathematical formula to determine what the speech is and in what context it was made, that courts have lost sight that the very silence or refusal to speak and the government's own attempts to stifle speech or offering of inducements or threats to attempt to control the potential speech of a public employee are the very problems that the First Amendment of the Constitution should protect against.

The rights of a First Amendment plaintiff should not hinge upon the type of proceeding in which he spoke or in which he refused to speak, when the speech or refusal to speak touches upon a more fundamental right, the right to tell the truth, a principle that our government is entrusted to uphold. Further, a public employee's First Amendment rights are infringed upon when his employer prevents a free interchange from even taking place, as the case in *Wasson*. The First Amendment inquiry should focus more on whether the government is engaging in a coercion or intimidation of its employees that would stifle free expression in the first place, thereby subverting the truth.

If this Court does not intercede, courts of appeals will continue to interpret the First Amendment in a manner that is allowing our very governments to subvert the truth and engage in the intimidation and coercion of their public employees.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 4, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14033
Non-Argument Calendar

D. C. Docket No. 98-14286-CV-DMM

BRIAN WILLIS,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency, LIN BUSHORE, individually and in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(May 4, 2000)

Before COX and WILSON, Circuit Judges, and FAY, Senior Circuit Judge.

Appendix A

PER CURIAM:

We affirm the summary judgment entered in favor of the defendants/appellees based upon the Order Granting Defendants' Motion for Summary Judgment entered on September 7, 1999 by the United States District Judge.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14033
Non-Argument Calendar

District Court Docket No. 98-14286-CV

BRIAN WILLIS,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency, LIN BUSHORE, individually and in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before COX and WILSON, Circuit Judges, and FAY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

Appendix A

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

Entered: May 4, 2000
For the Court: Thomas K. Kahn,
Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUL 25 2000

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FT. PIERCE DIVISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED AND FILED SEPTEMBER 7, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION

Case No. 98-14286-Civ-Middlebrooks

BRIAN WILLIS,

Plaintiff,

vs.

THE SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency, and LIN BUSHORE, individually, and in her official capacity,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendants' Motion for Summary Judgment (DE 19), Statement of Material Facts (DE 20), Memorandum of Law in Support of Motion for Summary Judgment (DE 21); Plaintiff's Memorandum of Law in Opposition (DE 27); Defendant's Reply (DE 36); and exhibits in support thereof. After a thorough review of the record and pleadings, for the reasons

stated below, Defendants' Motion for Summary Judgment **(DE 19)** is **GRANTED**.

I. INTRODUCTION

This is an action based on alleged retaliatory action taken by Defendant The School Board of St. Lucie County ("School Board"), and its principal, Defendant Lin Bushore ("Bushore"), against Plaintiff Brian Willis ("Willis") as a result of Mr. Willis's alleged exercise of his First Amendment rights of free speech and free association.

II. BACKGROUND

A. Statement of Undisputed Facts

The following facts are undisputed. Mr. Willis was an Agricultural Business and Natural Resources Instructor at Fort Pierce Westwood High School in St. Lucie County. Ms. Bushore was the principal of the high school. Mr. Willis had an annual contract subject to reappointment or non-renewal each year. During the 1996-97 school year, the School Board of St. Lucie County began an investigation of another teacher, Mr. Baron. A letter from Ms. Bushore indicating that she would not be recommending Mr. Willis's reappointment for the 1997-98 school year was delivered to Mr. Willis on or about May 2, 1997; the ultimate decision to not reappoint him was made by the School Board soon thereafter. The purported causal connection is that Mr. Willis's refusal to testify against Mr. Baron was followed by the decision to not renew Mr. Willis's contract.

Appendix B

B. Claims Before the Court

As to Mr. Willis's "freedom of association" claim, he alleges that at two points in the academic year, once in the early fall and once in December, Ms. Bushore told him that he should "distance himself" from Mr. Baron because Mr. Baron would not be there at the end of the year.[1]

The allegations underlying the "freedom of speech" claim are based upon two conversations Mr. Willis alleges took place between himself and Ms. Bushore. Mr. Willis claims that in April 1997, after Mr. Baron had been placed on administrative leave during an internal investigation following complaints by students and a staff member, he was approached by Ms. Bushore and told that he should testify against Mr. Baron; that it would be in his best interest to do so because if Mr. Baron was gone, he would be head of the agriculture department.[2] "She said she wanted me to testify against Mr. Baron, that I saw him chewing tobacco, that he didn't supervise his students, that he wasn't properly supervising his students at the farm, and that he let the students smoke and chew tobacco at the farm."[3] When Mr. Willis responded, "I can't do it," Ms. Bushore did not say anything and walked away.[4]

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1. Willis Affidavit at 5.

2. Willis Dep. at 38-40.

3. *Id.* at 42.

4. *Id.*

Mr. Willis claims that approximately a month later, Ms. Bushore again approached him and asked him to reconsider testifying against Mr. Baron. He alleges "[s]he said you know you do not have tenure, this is your first year here, and I can't see renewing your contract if you don't testify, or something to that effect."[5]

Mr. Willis was never asked by anyone else to give a statement, and he did not testify in any proceeding.[6] By letter dated May 1, 1997, Ms. Bushore advised Mr. Willis that she was not recommending him for a contract for the 1997-98 school year.

II. STANDARD OF REVIEW

The standard to be applied in reviewing summary judgment motions is contained in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. The moving party has the

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5. *Id.*, at 43.

6. *Id.* at 39-40.

burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1608-09, 26 L. Ed. 2d 142 (1970).

In applying this standard, the Eleventh Circuit has explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608; *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981). All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises v. Am. Hardware Mutual Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial. *Marsh*, 651 F.2d at 991; *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Id.* at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Elect. Tech. v. Wackenhut Prot. Systems*, 669 F.2d 1026, 1031 (5th Cir. 1982); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

> Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Addickes*, 398 U.S. at 160; *Marsh*, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). *See Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, 684 F.2d 1365, 1368-69 (11th Cir. 1982); *see also Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

The Supreme Court provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judgment must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80, 64 S. Ct. 232, 234, 88 L.Ed. 239 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court in *Anderson* further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Id.* at 252. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non- movant, summary judgment may be granted. *Id.* at 254-55.

We measure Defendants' Motion for Summary Judgment against these standards.

III. FIRST AMENDMENT RETALIATION

A. Freedom of Association

In *City of Dallas v. Stanglin*, 490 U.S. 19, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989), the Court delineated "two different sorts of freedom of association that are protected by the United States Constitution." One line of cases protects choices to enter into and maintain certain intimate relationships, including the right to marry and familial relationships. The second line recognizes a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for redress, and the exercise of religion. *Id.* at 24. (Citing *Roberts*

v. U.S. Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984). Although the Court has not held that no other relationships or associations could qualify for protection, the Court has stated that the Constitution does not, however, recognize a generalized right of "social association." *Id.* Here Mr. Willis claims no relationship with Mr. Baron outside of the workplace. The allegation is simply that Ms. Bushore suggested to Mr. Willis on two occasions that he distance himself from Mr. Baron, because Mr. Baron would not likely continue as an instructor.

There has been no showing by Mr. Willis of a material issue of fact that would allow for a jury to find that this relationship is one of the types for which freedom of association analysis is applicable.

B. Freedom of Speech

First Amendment retaliation claims are evaluated under the three-part analytical approach outlined in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). First, the employee must establish that the First Amendment protects the speech. Second, the employee must establish that the protected speech was a "motivating factor" in the decision not to rehire. Upon this showing, the burden shifts to the employer to demonstrate by a preponderance of the evidence that "it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.* at 286.

The Eleventh Circuit has expanded and clarified this analysis: "Where the public employer denies that the

employee was disciplined in violation of that employee's First Amendment rights, the Court engages in a four-stage analysis: (1) the employee's speech must involve a matter of public concern in order for it to be protected; (2) the employee's First Amendment interests must outweigh the public employers interests in efficiency (the *Pickering* balancing test); (3) the employee must have been disciplined, in substantial part, because of the protected speech; and (4) the public employer must not be able to prove by a preponderance of the evidence that it would have disciplined the employee even without the protected speech." *Johnson v. Clifton*, 74 F.3d 1087, 1092 (11th Cir.), *cert. denied*, 519 U.S. 808, 117 S. Ct. 51, 136 L.Ed.2d 15 (1996).

In order to be constitutionally protected, the speech in question must be speech as a matter of public concern. "When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without instrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of the statement. *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690.

Whether a statement is on a matter of public concern is a question of law. *Johnson*, *supra*, at 1092. The Eleventh Circuit has observed that "[i]f the relevant speech was motivated by personal concerns instead of public concerns then it is not protected by the First Amendment in this

context." *Id.* In evaluating whether speech may be fairly characterized as speech on a matter of public concern, "it is relevant to examine whether the public interest is asserted on the basis of a vague and general assumption that the public would be interested, versus an articulable, specific public interest." *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 916 (11th Cir. 1993).

The posture of this case does not readily lend itself to First Amendment analysis. Since Mr. Willis never spoke, it is difficult to evaluate the context of what he might have said. He never participated in any formal proceedings, never gave any testimony, sworn or unsworn, and no process was ever invoked to ask him to provide testimony. He never spoke with the lawyer from the School Board's law firm who was conducting the internal investigation of Mr. Baron. Under these circumstances, it is questionable whether speech is implicated in this case at all, much less speech on a matter of public concern.

A recent decision of the Eighth Circuit provides some guidance. In *Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999), an assistant chief of police prepared written statements concerning his discussions with two officers about incidents which led to their dismissal and the circumstances of their firing, at which he was present. Subsequently, the chief of police approached the plaintiff to tell him that some of the information in his statements was false and would need to be changed. Buazard stood by his statements and refused to make the changes. After being demoted, Buazard brought an action alleging violation of his First Amendment rights to free speech.

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The Eighth Circuit held that the speech in question was not a matter of public concern and was not protected by the First Amendment. The Court noted that the statements were prepared at the behest of the chief and were entirely internal to the police department. The refusal to change his statements was an action taken by Buazard in his role as a police officer. "Taken together the internal nature of the statements and Buazard's role as an employee in making the statements" led the Court to conclude that the speech was not a matter of public concern. *Id.* at 549.

To support his freedom of speech claim, the Plaintiff relies upon an unpublished opinion of the Tenth Circuit, *Metzner v. Stuyvesant*, 35 F.3d. 574, 1994 WL 461267 (10th Cir.(N.M.)). The plaintiff in that case worked as a systems analyst in the New Mexico Worker's Compensation Administration headed by defendant Stuyvesant. Stuyvesant was involved in a lawsuit with a former employee who alleged that she was fired for disclosing Stuyvesant's illegal conduct. Stuyvesant's attorney approached the plaintiff and asked her to sign an affidavit concerning misconduct by the former employee. The plaintiff alleged that she refused to sign the affidavit because it contained false information. Shortly thereafter she failed to receive a promotion.

The Tenth Circuit reversed the district court's grant of summary judgment in favor of the defendant. As a threshold matter, the Court stated that the plaintiff's refusal to sign an affidavit to be used in a legal proceeding containing an allegedly false fact was speech. The Court then determined that the speech touched on a matter of public concern since "[t]he affidavit was intended as proof on the issue of whether

a public employee was terminated for disclosing illegal conduct. . . ." Thus, concluded the Court, "plaintiff's refusal to sign the affidavit constituted speech on a matter of public concern."

There are significant differences between the *Buazard* and *Metzner* decisions. Unlike the situation in *Buazard*, in *Metzner*, there was a judicial proceeding underway and Metzner was asked by counsel in that proceeding to file an affidavit. The internal nature of the speech and the fact that the statement was asked of and provided by Buazard in his role as an employee were significant to the Eighth Circuit in reaching its decision.

The circumstances of this case are closer to those of *Buazard*. Here there was no judicial proceeding or external investigation underway. The alleged request was made by the principal of the school to Mr. Willis in his role as a teacher.

This case differs from both *Buazard* and *Metzner* in a manner that is especially significant from the standpoint of First Amendment analysis. In both of those cases the context of the speech had been formulated. In *Buazard*, the plaintiff had prepared written statements in which he had stated his recollection of the events. In *Metzner*, an affidavit had been prepared to which the plaintiff registered specific objections.

Here, Mr. Willis never expressed what he knew about the matters under investigation. His nascent speech never crystallized to the point that we can fairly evaluate what, if anything, he had to say about the matters under investigation and whether any statement that he might give would touch on matters of public concern.

Accepting Mr. Willis's allegations as true, he was asked to give a statement, which he never did, and, admittedly based upon nothing explicitly said, that he was being asked to lie. This case is about conduct, not speech. The observation of the Eighth Circuit in *Buazard* is particularly applicable here. If, as Mr. Willis contends, his superior ordered him to lie, and retaliated against him for refusing to do so, an injustice was done. But it is not one actionable under 42 U.S.C. § 1983 on a free speech theory. *See*, *Buazard*, *supra*, at 549.

IV. LIABILITY OF THE SCHOOL BOARD

While our ruling on the merits of Plaintiff's First Amendment retaliation claims is dispositive of the case, the novel nature of the claim and resulting lack of clear precedent within the circuit makes it advisable to analyze other issues bearing on the liability of the School Board and the individual Defendant.

Monell v. Department of Social Services of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d. 611 (1978) holds that local governments may not be held liable for constitutional deprivations on the theory of respondeat superior.[7] They may be held liable only if the action results from an official government policy, the actions of an official fairly deemed to represent government policy, or a custom or practice so pervausive and well settled that it assumes the force of law. *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38; *Sewell v. Town of Lake Hamilton*, 117 F.3d 488 (11th Cir.

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7. School boards constitute branches of local government and thus may be subject to liability under *Monell*. *See*, *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305, 310 (11th Cir. 1989).

1997), *cert. denied*, __ U.S. __, 118 S. Ct. 852, 139 L.Ed.2d 753 (1998). In order for the actions of a government official to be deemed representative of the local government, the official must be imbued with policymaking authority. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S. Ct. 1292, 1299, 89 L.Ed. 2d 452 (1986).

Mr. Willis does not argue that any official policy, custom or practice of the School Board is implicated in this case. Rather, while conceding that whether a particular official has final policymaking is a question of state law, he argues that Principal Bushore "shared final policy making authority with the School Board regarding hiring and termination decisions on non-tenured employees . . . ."

The identification of those officials whose decisions represent the official policy of the local government unit is a legal question to be resolved by the trial judge before the case is submitted to the jury. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724, 105 L.Ed.2d 598 (1989). Reviewing state law and custom or usage having the force of law, the trial judge must identify those officials or government bodies who speak with final policymaking authority for the local government concerning the action alleged to have caused the particular constitutional violation at issue. *Id.*

Section 230.23(5), Florida Statutes, provides that the School Board, acting as a board, shall have the powers of appointment, compensation, promotion, suspension, and dismissal of employees. Under Florida law, the ultimate responsibility to employ or not to employ a teacher rests

with the district school board. *Witgenstein v. School Bd. of Leon County*, 347 So. 2d 1069, 1073 (Fla. 1st DCA 1977).

Presumably, Mr. Willis bases his concept of "shared" final policymaking authority on the fact that Ms. Bushore recommended that the superintendent of schools recommend to the School Board the non-renewal of Mr. Willis's contract. This argument falls far short of the mark. The power to recommend is not the power to decide. Moreover, a final policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review. *Denno v. School Bd. of Volusia County, Fla.*, 182 F.3d 780 (11th Cir. July 26, 1999) (No. 98-2718, slip. op. at 3389); *Scala v. City of Winter Park*, 116 F.3d 1396, 1401 (11th Cir. 1997). Ms. Bushore, as a school principal, was not a final policymaker so as to make the School Board liable under *Monell*.

V. QUALIFIED IMMUNITY FOR THE INDIVIDUAL DEFENDANT

Qualified immunity shields government officials from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir. 1998). That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. *Lassiter v. Alabama A & M University Bd. of Trustees*, 28 F.3d 1146 (11th Cir. 1994).

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For the law to be clearly established to the point where qualified immunity does not apply, the law must have earlier been developed in such a factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Once qualified immunity is raised as a defense, a plaintiff bears the burden of showing that the federal "rights" allegedly violated were "clearly established." *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir.), *cert. denied*, 493 U.S. 831, 110 S. Ct. 101, 107 L.Ed.2d 65 (1989).

The Eleventh Circuit has cautioned trial judges to not permit plaintiffs to discharge their burden by referring to general rules and the violation of abstract rights and has stated that "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Lassiter v. Alabama A & M University*, *supra*, at 1150, quoting *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994). In order for qualified immunity to be lost, pre-existing law must dictate and truly compel, not just suggest or allow or raise a question about the conclusion that what a defendant is doing violates federal law in the circumstances. *Lassiter*, *supra*, at 1150.

In First Amendment retaliation cases it is especially difficult for a claim to overcome the shield of qualified immunity. *Johnson*, *supra*, 74 F.3d 1087 (11th Cir. 1996); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989). As the Eleventh Circuit has explained, the

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Supreme Court has never established a bright-line standard for determining when a local government as an employer may take action adverse to an employee in response to that employee's speech. Instead, a balancing test has been formulated that requires a court to balance the interest of the employee in commenting on matters of public concern against the employer in performing public services efficiently. *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). This balancing necessarily requires a case-by-case approach. "Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where the *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Dartland, supra*, at 1323.

In the qualified immunity context, we must focus on what Ms. Bushore knew. *See, Johnson, supra*, at 1093. She had received complaints from a staff member and numerous students about the conduct of Mr. Baron, a faculty member whom Mr. Willis had a frequent opportunity to observe.[8] She asked Mr. Willis to testify or provide a statement in an ongoing internal investigation. He refused to provide any statement, saying to do so would be a lie. He did not seek to provide a statement helpful to Mr. Baron, and apparently never told anyone what, if anything, he knew or did not know about the allegations in question. Without knowledge about what Mr. Willis knew, or the truth of the allegations made

8. Bushore Dep. at 8-9; Willis Dep. at 30.

by the staff member or students concerning Mr. Baron, Ms. Bushore could not know whether Mr. Willis wanted to protect Mr. Baron, had no information of significance, or was simply recalcitrant. Assuming that his refusal to provide a statement played a role in Ms. Bushore's recommendation to the superintendent not to renew the Plaintiff's annual contract, there is no case which might have clearly told her that she could not take such action. Her conduct did not violate clearly established law, and she is entitled to the protection provided by qualified immunity.

VI. CONCLUSION

The Plaintiff cannot establish that he engaged in speech protected by the First Amendment. Moreover, the action about which he complains was not taken by an official with final policymaking authority and therefore the Defendant School Board may not be held liable. Applying the analysis required by Supreme Court and Eleventh Circuit precedent, the individual Defendant Bushore's conduct did not violate clearly established law and so she is entitled to the protection provided by qualified immunity. Summary Judgment is therefore entered in favor of the Defendants.

DONE and ORDERED at Miami, Florida, this 7th day of September, 1999.

s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 13, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-14033-JJ

BRIAN WILLIS,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF ST. LUCIE COUNTY, a state agency, LIN BUSHORE, individually and in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: COX and WILSON, Circuit Judges, and FAY, Senior Circuit Judge.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
SENIOR UNITED STATES CIRCUIT JUDGE